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82-883

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner,

-vs-

RAYMOND GALLAGHER,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

RESPONDENT ADOPTS THE QUESTION PRESENTED BY PETITIONER.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

NOW COMES the respondent, Raymond James Gallagher, by and through his attorney, ROBERT H. ROETHER, and hereby prays that this Honorable Court deny the petitioner's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

That respondent accepts the statement of constitutional provisions involved as set forth by petitioner.

COUNTER-STATEMENT OF FACTS

Respondent accepts the jurisdictional portions of petitioner's Statement of Facts. However, the factual recitation by petitioner of testimony produced at new trial proceedings is misleading in that it mischaracterizes testimony and omits substantial portions of testimony adopted by the trial judge in his ruling.

One example is petitioner's assertion that trial counsel's former client, the alternative suspect to the defendant, had been represented by trial counsel several years before. Petitioner was harmed by making this misrepresentation in appellate proceedings in state court since petitioner had earlier stipulated that the alternative suspect had pled guilty only *weeks before* the homicide defendant was charged with and was also found to be still on probation for that charge even as late as the post-trial proceedings (stipulation by assistant prosecutor and present defense counsel, Tr. 7-9-80 p. 10).

Additionally, the most relevant testimony of the trial counsel's private investigator came when the investigator testified that he took information from two witnesses as to "leads" that the former client had been involved in the present homicide to defendant's trial counsel. He took leads

from two different witnesses and had leads pointing to no other individual other than the former client. (Tr. 7-9-80 pp. 16 & 17) For petitioner to draw some significance between the investigator saying that he had no "links" leading to the former client when he also testified that he had "leads" leading to the former client is specious. Of even more significance was the fact that the investigator testified that when he presented this information to trial counsel, that trial counsel instructed him not to pursue these leads any further and not to investigate the former client:

> "ROETHER: Then what, if anything, did Mr. Lippitt tell you regarding the, this, these leads relating to Burton Schwartz?
>
> INVESTIGATOR: Well, I discussed with Mr. Lippitt and Mr. Lippitt said he had defended Burton Schwartz in a drug case—I don't know exactly when; I believe it was not too long ago—and that he knew Schwartz and that he had a good reputation. He said that he could not be mixed up in this. He says don't go any further on that now." (Tr. 7-9-80 p. 46)
>
> "ROETHER: All right. And did you go any further after that point as far as investigating Burton Schwartz?
>
> INVESTIGATOR: No sir. (Tr. 7-9-80 p. 22)
>
> * * *
>
> ROETHER: Is it fair to say that after your conversation with Mr. Lippitt, you did not begin or you did not continue to investigate leads relating to Burton Schwartz?
>
> INVESTIGATOR: That's correct. (Tr. 7-9-80 p. 23)
>
> * * *
>
> INVESTIGATOR: When I related to Mr. Lippitt, who hired me, he said do not do anything further on Mr. Schwartz; I didn't." (Tr. 7-9-80 pp. 30-31)

Finally, trial counsel admitted that he instructed his investigator not to investigate the former client and had no

knowledge as to whether or not he had informed his present client of this decision (Tr. 9-24-80 p. 162). While trial counsel did not acknowledge "suppressing" any material leading to his former client, he did state that he was unable to articulate a good reason why he did not use such material as he did have (Tr. 9-24-80 pp. 175-177, pp. 86-89).

ARGUMENT—REASONS FOR DENYING THE WRIT

Michigan courts have not misapplied controlling case law relating to the grant of a new trial based on ineffective assistance of counsel due to a conflict of interest. The record in the Michigan courts is quite clear. Post-trial testimony before the trial judge consumed hundreds of pages of sworn testimony. The most significant testimony, as indicated by the Statement of Facts by both parties, involves testimony of defendant's former trial counsel, his investigator, and the contradicting testimony of the former trial counsel's law associate. Even more important, the trial judge is a widely recognized scholar and jurist. His opinion in this case exceeded 80 pages, half of which were devoted to the conflict of interest and its impact on defendant's trial.

There are two errors of analysis in petitioner's reasoning. One error is very readily ascertained by this court. While the Michigan Court of Appeal's opinion in this matter is somewhat more tepid than respondent would have wished given the strength of the record before the trial court, petitioner has simply misread or is misrepresenting the opinion of the Michigan Court of Appeals. Petitioner represents that the Michigan Court of Appeals found only that a "potential conflict of interest" "may have affected" defendant's trial. In virtually every instance in which the Michigan Court of Appeals referred to conflict of interest it used precisely that term—conflict of interest. As discussed below, the trial court most emphatically found an actual conflict of interest and a detrimental effect to the defendant's case. The Court of Appeals found that the trial court

was correct in this respect. The only instance in which the Court of Appeals made reference to a "potential" conflict of interest occurs in the second paragraph on page 26 of the petitioner's brief filed with this court. At this juncture, the Michigan Court of Appeals was discussing the fact that it was unclear whether or not defendant's trial counsel had ever informed defendant of the potential conflict of interest. The use of the term "potential" in that context is apt in that it was still a "potential" at that juncture. Had trial counsel informed the defendant when the conflict was still a "potential" one, defendant could have made an informed choice to either proceed with a waiver or seek other counsel.

The opinion of the Michigan Court of Appeals speaks for itself. This leads to the second error in analysis committed by petitioner. Petitioner's brief speaks of what it feels the Michigan Court of Appeals found and did not find relating to the facts. At least in the state of Michigan, appellate courts are not factfinders. They do not hear the case de novo. Rather, they examine the findings of the trial court to see if the evidence supports those findings. As the references to the trial court's findings below will indicate, the trial court was both aware of and went beyond the holdings of the United States Supreme Court in *Cuyler* v *Sullivan*, 446 US 335, 100 S Ct 1708, 64 L Ed 2d 333 (1980). *Cuyler* held that:

> "A defendant who shows that a conflict of interest actually effected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler* v *Sullivan, id* 64 L Ed 2d 347.

No litigant in this case seriously questions what the legal standards in this area are. Respondent exhaustively briefed this issue for Michigan appellate courts, citing and discussing over 30 appellate decisions from Michigan and all levels of the federal judiciary. This case does not hinge around an interpretation of the law, but hinges around reading the thousands of pages from the trial and post-trial

poceeedings necessary to render a decision. The appendix prepared below is a *partial* reproduction of the opinion of the trial court. Respondent would urge that this court examine the findings of the trial court since this is the basic factfinding document that is really at issue on this case. Respondent is quite confident that this court will find that the scope and significance of the finding of the trial court more than meets the standards set forth in *Cuyler* v *Sullivan, supra.*

CONCLUSION

Petitioner has demonstrated no need for this court to assert its jurisdiction to hear this case.

WHEREFORE, respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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II.

A.

After hearing the evidence, ordered in the remand, I find, as I did in my July, 1980, opinion, that the defendant, Raymond Gallagher, was denied the effective assistance of counsel.

I stand by that opinion except as elaborated on or corrected in this one.

Let me examine the conflict of interest issue more thoroughly than I did in my July 15th opinion from the bench. I shall deal with these questions:

What are the legal rules and standards governing the conduct of lawyers respecting conflicts of interest?

Under these rules and standards, was Norman Lippitt involved in a conflict of interest?

Did the conflict of interest detrimentally affect Lippitt's representation of Gallagher?

Was the conflict of interest harmless respecting the outcome of the case?

B.

The legal rules and standards concerning conflict of interest come primarily from the Code of Professional Responsibility and the case law.

Canon 5 of the Michigan Code of Professional Responsibility provides:

> "A lawyer should exercise *independent* professional judgment on behalf of a client." (Emphasis supplied).

Disciplinary Rule 5-101(A) provides, (6) insofar as pertinent:

> "Except with the consent of his client after full disclosure a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or *reasonably may be affected* by his own financial, business, property, or *personal interests*." (Emphasis supplied).

Canon 4 states:

"A lawyer should preserve the confidence and secrets of a client.

"(B) . . . a lawyer shall not knowingly use a confidence or secret of his client to the disadvantage of the client."

In *People* v *Garcia*, 398 Mich 250, the Michigan Supreme Court announced the standard for effective assistance of counsel. It is a twofold test. First, a lawyer must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Second, a lawyer "must conscientiously protect his client's interests undeflected by competing considerations."

Under the Code of Professional Responsibility and the *Garcia* case, Lippitt was involved in a conflict of interest. He could not properly use any confidence or secret of B.S. to the advantage of Gallagher, but to B.S.'s disadvantage. At the time he undertook to represent Gallagher, around March of 1979, or very soon thereafter, his professional judgment in Gallagher's case might reasonably be affected by his personal interest in and concern for B.S. He had had a personal and professional relationship with B.S. Although his attorney-client relationship with B.S. had ended in March (7) of 1978, the personal relationship pre-dated the professional relationship and continued after the professional relationship ended. A lawyer who ceases to represent a client may, nevertheless, be held to be involved in a conflict of interest between his former client and a present client; *Tucker* v *US*, 235 F 2d 238 (1956, CA 9, Cal); *Taylor* v *US*, 96 App DC 379, 226 F 2d 337 (CA 2, NY, 1967), cert den 389 US 874, reh den 389 US 964.[3] Moreover, Lippitt did not protect Gallagher's interests undeflected by competing considerations of B.S.'s interests.

---

3 Because B.S. was not a client, but a former client, of Lippitt during Lippitt's representation of Gallagher, DR 105 of the Code of Professional Responsibility is not strictly applicable. Nevertheless, the spirit and purpose of DR 105 may influence and guide judges in the formulation of legal rules. DR 105(A), (B), and (C) provide:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is

(Footnote continued on page 3a)

C.

Having made these conclusions of law and findings of ultimate fact, let me recite the detailed facts and evidence on which the findings of ultimate fact are predicated.

The people's theory and evidence pointed to only one person as the originator and instigator of the plot to assassinate Leon Sommers; this person was Raymond Gallagher.

The conflict of interest between Gallagher and B.S. became apparent when information came to Lippitt which tended to show that his former client, B.S., had a motive to kill Leon Sommers; and which tended to make B.S. the principal "alternate suspect." Some of this information indicated that B.S., rather than Gallagher, originated the homicidal plot, paid for the hit men and paid for Edmonds' services, as an intermediary in hiring them.

This information came to Lippitt early in March of 1979, soon after he had been retained by Gallagher. It had already been stated that Lippitt's relationship with B.S. (8) was personal as well as professional. Lippitt and B.S. have known one another since they were high school students. They attended different schools, but saw one another at social and recreational events. They are about the same age—in their early forties. The nature of the relationship between Lippitt and B.S. will be explored more fully later in this opinion.

(Footnote continued from page 2a)

likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

"(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

"(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Gallagher had and continues to have an interest in being acquitted of the Sommers' killing. B.S. had and continues to have an interest in his reputation and in not being prosecuted for murder or any other offense. When the information implicating him in the Sommers murder reached Lippitt, B.S. was on probation on a cocaine related charge. To pursue Gallagher's "alternate suspect" defense vigorously was to jeopardize B.S.'s interests. To pursue B.S.'s interests was to jeopardize the interests of Gallagher.

The marshalling of evidence that would tend to cast suspicion on B.S. would be helpful to Gallagher, but harmful to B.S. The production of evidence at trial focusing suspicion on B.S. would have the same effect. For Lippitt to use any secret or confidence of B.S. to B.S.'s disadvantage would violate Canon 4 of the Code of Professional Responsibility.

(11)

D.

The next question is, did the conflict of interest affect Lippitt's representation of Gallagher? Or, formulated in the language of *Garcia*, did Lippitt "conscientiously protect his client's interests undeflected by competing considerations?" The evidence shows that Lippitt's concerns for B.S. affected and "deflected" his judgment in the representation of Gallagher. The evidence shows that the conflict of interest detrimentally affected (12) Lippitt's performance as Gallagher's advocate. The conflict of interest had a detrimental affect on Gallagher in both the investigative phase of trial preparation and in the trial itself. The evidence shows that there were acts and decisions on the part of Lippitt, detrimental to Gallagher, that have no explanation other than Lippitt's concerns for B.S., his friend and former client.

(12a)

There was testimony from Gallagher, which rang true, that Lippitt told Gallagher that he had an outstanding investigator, Robert O'Neil, who would skilfully investigate the potential defense of "alternate suspect." Mr. Lippitt's description of O'Neil was correct. O'Neil has had a wealth of training and experience as an investigator. He obtained 20 years of this training and experience as an agent of the Federal Bureau of Investigation. O'Neil retired from the U.S. Navy as a captain. O'Neil testified in the July, 1980, hearing without discussing his testimony in advance with Lippitt, who was unavailable. Much of my July decision is based on O'Neil's testimony.

Lippitt employed and directed O'Neil. O'Neil reported to Lippitt and was paid by Lippitt. With respect to O'Neil, Lippitt did an astounding thing. He did so soon after being hired by Gallagher and after having been informed that B.S. had expressed fear that Sommers would inform on B.S. like he had on Gallagher. He did so after being informed that B.S. told Gallagher, who had been given a stay of sentence in his Dyar Act case, that Gallagher should turn himself in to start serving his prison term, because something was going to happen to Sommers. (13) When Lippitt took the astounding step, he had also been informed that Edmonds had admitted that B.S., and not Gallagher, arranged the hit on Sommers. The astounding thing Lippitt did, after getting this information, was to order O'Neil to stop investigating any information or leads that could direct suspicion on B.S.

(15)

Mindful of this information, Lippitt stopped the investigation of B.S., and the only reasons Lippitt gave O'Neil for the "stop order" were that B.S. had a good reputation and was not the kind of person to become involved in hiring a "hit."

This was Lippitt's explanation to O'Neil, despite the fact that Lippitt represented B.S. when he was convicted of

a federal narcotics offense. Furthermore, early on, there was a substantial amount of information that had come to Mr. Lippitt which tended to show that B.S. had anything but a good reputation in the community in which he lived and worked, and, indeed, to the contrary, that he had acquired a reputation of being involved in the purchase and sale of stolen auto parts and in dealing in narcotics—particularly cocaine—with Leon Sommers working for B.S. in these criminal enterprises. Also, when Lippitt gave O'Neil reasons for dropping the investigation Lippitt had information that B.S. was feared by members of the underworld with whom he associated. We will return to this subject.

Moreover, one must seriously question Lippitt's ability to make a neutral and objective judgment concerning the potential of his friend and former client to finance and arrange an assassination of a man whom he perceived as a risk to his freedom. Jesse Pickerel was one of the persons interviewed by (15a) O'Neil. He gave O'Neil a statement in which he said that at times B.S. behaved like a "madman."

As pointed out earlier, even before Lippitt "called off" O'Neil, he was protective of B.S. At the very outset, Lippitt had spoken at length to Gallagher's sister and to Karen Ahleong, the mother of Gallagher's child. They gave Lippitt the names of persons who associated with Gallagher and who could have had a motive either to kill Sommers or to "frame" Gallagher. Both ladies mentioned B.S.'s name, among others. After this discussion, Lippitt left a "memo" for O'Neil at Lippitt's office. This memo contained the names of seven or eight persons to be investigated or interviewed. B.S.'s name was omitted. O'Neil started his investigation without notice that B.S. might be an "alternate suspect."

Lippitt "called off" O'Neil when O'Neil brought Lippitt information which cast suspicion on B.S.

If "calling off" O'Neil in the very beginning of the case before the "facts were in" was not a deliberate coverup, it

was a hasty, ill-formed, ill-considered judgment, not grounded on any facts. Lippitt's belief that B.S. would not participate in a conspiracy to murder seems to have been based, not on facts but on intuition and feelings. I cannot conclude that the decision was grounded in strategy or considerations of time or defense resources. I will discuss these possible explanations later. I find that Lippitt's decision not to conduct any investigation that would cast suspicion on B.S. was rooted in Lippitt's concern for the welfare of B.S.

E.

The next question is whether the calling off of the investigation of leads to B.S. was detrimental to Gallagher.

Someone said that success in the trial of a criminal case is 1/10 inspiration and 9/10 preparation. Preparation of the facts is particularly important. The preparation of the "alternate suspect" defense was cut short by Lippitt.

(16, 17)

After being directed to stop investigating leads to B.S., Robert O'Neil interviewed some thirty witnesses, approximately three-quarters of all the persons he interviewed during the entire case. After the direction from Lippitt, which could have come as early as March 9, 1979, and not later than the end of March, 1979, O'Neil did not initiate any inquiry concerning B.S.'s motive to be involved or his involvement in the assassionation. While O'Neil did not close his ears if a person volunteered information about B.S., he did not probe further with questions or with any attempt to obtain evidence concerning B.S. that would be admissible in court or useful in cross-examination, or with any attempt to obtain information that could lead to such evidence.

Once O'Neil was "called off" the investigation of leads to B.S., he was never again directed to return to the investigation.

It should be noted that Lippitt, himself, did almost no investigating. The only investigative work that Lippitt performed was to interview Gallagher and Robert Wind at Milan Prison. Prison authorities would not permit O'Neil to interview these men, personally, because he was not their lawyer. Except for the minor investigative effort by Lippitt, he relied completely on O'Neil for the investigative phase of preparation for trial.

F.

Moreover, Lippitt "called off" the investigation without informing Gallagher and without obtaining his consent. In a matter so delicate and important as the investigation of leads focusing suspicion on Lippitt's former client, the duty of effective representation required Lippitt to disclose to Gallagher the plan to stop the investigation and to inform him of the possible effect of such a decision. 4 Lippitt did not obtain the informed consent of Gallagher.

(20)

Here, we have a host of leads and information, arising before trial, and focusing suspicion on B.S. as the instigator of the conspiracy. *Garcia's* lawyer of ordinary training and skilled in the criminal law would have a duty to see to it that the information and leads were investigated. Norman Lippitt did not do so. He did the opposite. He "called off" his investigator.

While it is difficult to know exactly what evidence would have been turned up in a conscientious investigation by O'Neil of the "B.S. leads," the evidence shows a strong probability that Gallagher was prejudiced by Lippitt's suppression of the investigation.

(21)

Lippitt now admits that it was a mistake on his part not to cross-examine Hastings in this manner. But when one looks at the evidence as a whole, one does not see an

4 Compare Canon 5, DR 5-105(C), supra.

inadvertent error on Lippitt's part; one sees another example of Lippitt's coverup of B.S.

Clearly, Robert Wind had sufficient information to testify that the mysterious Swanson was really B.S. Whether he would have gone so far as to say so on the witness stand is questionable. Lippitt, of course, didn't ask Wind whether he knew that "Swanson" was merely an alias for B.S.

Lippitt testified that he did not want to impeach Wind on the issue whether Wind knew that Swanson * * *

(24)

There were potential witnesses available to Lippitt who knew or who believed on the basis of evidence, "harder" than mere reputation evidence, that B.S., like "Swanson," was in the narcotics and the "hot" car parts business.

Among these potential witnesses were Harry Traylor, Pierre Alexander, Sergeant Chester Hastings, and Raymond Gallagher. Even Antolak might have given such testimony. 5a These witnesses or potential witnesses were not asked for their knowledge of B.S.'s illegitimate activities.

Moreover, a public federal court record was available to show that B.S. was indicted on a charge of participating in large scale narcotics conspiracy and was convicted of possession of cocaine on his guilty plea, after a plea bargain, pursuant to a certain federal court rule.

Another public record, an assumed name certificate, was available to show that B.S. was in the car parts business on X Road.

B.S.'s affluence could be demonstrated by the location and nature of his home and by the kind of cars he owned and drove.

(25)

Edmonds' brother-in-law, and partner, Harry Traylor, was willing and able to testify that Edmonds had transacted business in stolen parts with B.S. Traylor was not ques-

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5a Indeed, Edmonds, on cross-examination, admitted that he delivered a "hot" front end of an automobile to the victim, Leon Sommers, at X Auto Parts Co. But Lippitt made no attempt through other witnesses to show that B.S. was the owner of X Auto Parts Co.

tioned to elicit such testimony. Traylor had "eye-witness knowledge" on which such testimony could be based. Many of Edmonds' transactions in the stolen car business were also Traylor's. Traylor's testimony at trial was favorable to Gallagher in all respects. In his testimony, Traylor freely admitted that he made his living as a car thief.

Lippitt made no attempt to elicit testimony which would show that B.S. fit the description of Swanson. Lippitt made no attempt to offer documentary evidence to show that Swanson and B.S. were one and the same.

(28, 29)

Did the conflict of interest, in which Lippitt involved himself adversely, affect Gallagher's defense? Clearly, it did. To sum up, Lippitt, very early in his representation of Gallagher, ordered his "crack" investigator not to follow any leads that gave promise of turning up evidence that would focus suspicion on B.S. although the leads were plentiful and promising.

(30)

* * * stand to testify that he knew Swanson or had ever met him. Gallagher came off looking like a drowning man grasping for a straw that wasn't there. The persons who knew Swanson, alias B.S., as a living reality were not called as witnesses. The able Mr. Lippitt ineptly presented the defense of "alternate suspect." I conclude that Lippitt's incisive mind and keen ability were blunted by concern for his friend and former client. Lippitt's handling of the defense of "alternate suspect" will be discussed at greater length when I deal with Lippitt's argument that strategy rather than concern for B.S.'s interests determined his decisions throughout the entire period of Lippitt's representation of Gallagher.

The conclusion is inescapable that Lippitt's defense of Gallagher in preparation for trial and in trial was adversely affected by the conflict of interest in which Lippitt was involved.

K.

Let me leave Lippitt's actual pre-trial and trial performance to discuss other subjects more fully than I have up to this point—the subjects of trial strategy, time, money and priorities. At the post-remand hearing, Lippitt attempted to show that considerations of time, money, and trial strategy caused him, a long time after he was retained to direct his investigator to give a low priority to following up any leads which would cast suspicion on B.S. He tried to show, also, that strategic considerations caused him not to cast B.S. in the role of "alternate suspect, number 1," at trial.

The evidence is strongly against Lippitt on all of these propositions. The evidence demonstrates the following facts.

It was not late in the "game," but in the first few "innings" that Lippitt directed the investigation (31) away from his former client. Lippitt was retained in late February, or very early March of 1979. Lippitt "called off" O'Neil in the first in-person meeting between the two after Gallagher retained Lippitt. He "called off" his investigator before the month of March was over.

When Lippitt called off his investigator, time was not a problem. The trial was originally scheduled for mid-August. It was adjourned on defendant's motion to October 2nd.

Lippitt did not instruct his investigator, O'Neil, to give a low priority to investigating leads to B.S.; he "shut off" the investigation completely, early in the game, and never "turned it on" again.

With respect to the claim that funds were limited, funds were not the problem when the investigation of B.S. was terminated in March. Monies were paid to Lippitt by Gallagher and his family in advance against Lippitt's charges of $100 an hour and O'Neil's charges of $25.00 an hour. As of late May, Gallagher's account still had a substantial balance. It was not a shortage of money that closed down the investigation of B.S. in March.

Thus, before enough evidence had been gathered to fully develop defense strategy and before time or money became a problem, and without sufficient information to permit a reasonable judgment that B.S. could not be tied in as an "alternate suspect," Lippitt made a decision, concerning the investigation, favorable to his former client and detrimental to Gallagher. The decision, *in limine*, is not even debatably justifiable as a strategy decision that a lawyer of ordinary training and skill in the criminal law could make. *People* v * * *

(33)

When the first three priorities were substantially completed, there was adequate money available for investigation of the B.S. leads; Gallagher had a substantial credit in his account with Lippitt; three months remained until trial.

The trial began on October 2, 1979, with a non-jury evidentiary hearing. Lippitt had obtained a mortgage on Gallagher's home to secure payment of $20,000.00. On or about September 19, 1979, Lippitt received payment of $20,000.00 following the sale of Gallagher's home.

The trial started with a lengthy evidentiary hearing concerning alleged intimidation of witnesses by Taylor police officers. Before the presentation of proofs to the jury began, there was time and money, enough, for an investigation of "B.S. leads" which gave promise of making the defendant's "alternate suspect" theory come alive.

Gallagher testified that he paid Lippitt over $72,000.00 in fees, including payment for O'Neil's services as an investigator. Lippitt testified that his firm received about $58,000.00, exclusive of what was paid to others, including O'Neil, in costs and expenses. A large amount of the fee resulted from the great length of the trial and the more than average number of hours per trial day. Both Lippitt and O'Neil were present at the trial every day.

It is fair to say that a shortage of money is not the reason that investigation of leads to B.S. was ended in the

first month of Lippitt's retention and was never resumed at any time before the trial.

I do not question the proposition that money problems arose some time after the 6-week trial got under way. With the fees piling up at $750.00 per day or more, a (33a) six-week trial would use up about $18,000.00 in fees; not to mention costs. But when Lippitt made his decisions to call off and not to reopen the investigation of B.S., no one, least of all Lippitt, expected that the trial would last for anywhere near six weeks. Long before the trial began, when there was no money shortage, Lippitt made his decisions to "call off" O'Neil. After the high priority investigative work was completed, plenty of money remained to return to the investigation of B.S. But Lippitt did not do so. Thus, time, money and priorities do not explain Lippitt's suppression of the investigation of B.S.

(34)

I have mentioned the conversation between Lippitt and his associate, Steven Sinkoff, concerning Swanson. Lippitt was not forthright with Sinkoff. Lippitt spoke to Sinkoff as though there might be a genuine living person named Swanson. He concealed from Sinkoff the fact that Swanson was B.S. He concealed from Sinkoff the fact that B.S. was a former client.

(35)

Lippitt never revealed to Sinkoff that B.S. was the owner of X Auto Parts Co., although the named business had a prominent role in the case. Nothing in the file revealed B.S.'s connection with X Auto Parts. Lippitt did not reveal to Sinkoff that B.S. and Sommers worked together in stolen car, stolen car parts, and narcotics deals. Nor did anything in the file disclose the illicit association of B.S. and Edmonds in the "hot" car parts business. Lippitt did not reveal to Sinkoff that B.S. had dealings with Antolak and Traylor involving stolen cars, stolen auto parts, or illicit drugs. Nor did the file reveal such information.

Lippitt never revealed to Sinkoff that B.S. was a former client of Lippitt's. Lippitt stripped the office file on the Gallagher case of references to B.S. For example, O'Neil's written memo to Lippitt containing information from Gallagher about B.S. was never seen by Sinkoff although Sinkoff had unlimited access to the file, did a great deal of work on the case, and was completely familiar with the file. This is the memo in which there is outlined B.S.'s great fear that Sommers implicated him in his testimony in the Dyar case; B.S.'s statement that Sommers could put him away for a long time because Sommers knew so much about B.S.'s illicit activities; Sommers' employment by B.S. in hot car parts and narcotics dealings; and B.S.'s statement that something should be done about Sommers.

(37, 38)

So complete was the cover-up of B.S. within the Lippitt office that when the trial began, Sinkoff did not know that B.S. had been Lippitt's client; that Lippitt represented B.S. in a case in which Robert Wind was a co-defendant; that Swanson was B.S.; that B.S. was owner of X Auto Parts; or that Sommers, Edmonds, Antolak, and Traylor had illicit dealings with B.S.

This is very significant in view of the role that Sinkoff had in this case, a role which Lippitt underportrayed in his testimony. Sinkoff was Lippitt's principal assistant in this case. He assisted Lippitt in the preparation of both the facts and the law. Sinkoff presented a large portion of the proofs in the evidentiary hearing on the issue of intimidation of witnesses by the police. He wrote the brief on this issue. Sinkoff argued the original motion for a new trial and wrote the brief in connection with this motion. He had full access to the office file in the Gallagher case.

(45, 46, & 47)

The Michigan Supreme Court reversed the Court of Appeals. The Supreme Court held first that the lawyer appointed to represent the two defendants was involved in a

conflict of interest, which deprived defendant Bentley of his right to counsel. The Supreme Court said:

> ". . . [W]e reach the remaining question whether this error can be said to have been harmless beyond a reasonable doubt. We conclude that denial of the right to effective assistance of counsel in this case is so offensive to the maintenance of a sound judicial process that it cannot be regarded as harmless error."

The Michigan Supreme Court in *Bentley* cited *People* v *Mobley*, 390 Mich 57, and *People* v *Robinson*, 386 Mich 551, cases which hold that certain violations of a defendant's rights are so offensive to sound judicial process that they can never be considered harmless errors.

Thus, *Bentley* can be taken to mean that when a defendant in a criminal case is denied effective assistance of counsel, because his lawyer is involved in a conflict of interest, the violation of his right can never be treated as harmless. *Glasser* v *US*, 315 US 60, 92, also can be interpreted as holding that ineffective assistance of counsel resulting from a conflict of interest that adversely affects counsel's performance can never be regarded as harmless.

Even if this is not a correct interpretation of the *Bentley* and *Glasser* cases, there is an abundance of authority to the effect that violations of a defendant's constitutional rights may not be treated as harmless, unless shown by the prosecutor to be harmless beyond a reasonable doubt. *People* v *Robinson*, 386 Mich 551; *People* v *Wichman*, 15 Mich App 110; *Chapman* v *California*, 386 US 18. 7

The evidence in the instant case shows that Gallagher was denied effective assistance of counsel by reason of Lippitt's involvement in the conflict of interest between B.S. and Gallagher.

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7 In *Chapman*, the U. S. Supreme Court said, ". . . before . . . a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The people have failed to show beyond a reasonable doubt that the effect of the conflict of interest was harmless. Indeed, the preponderant evidence shows that the denial of effective assistance of counsel by reason of the conflict of interest played a causal role in producing a verdict of guilty.

Cuyler v *Sullivan*, 48 Law Week 4517, Docket 78-1832, decided by the U. S. Supreme Court in May of 1980, is cited by the people, but does not help them. It holds that a mere possibility of defense counsel being involved in a conflict of interest does not warrant a new trial. In the instant case, we have much more than a possibility; we have a demonstrated conflict of interest. Moreover, in *Cuyler*, defense counsel fully and carefully informed his client about the decision whether to testify. After the defendant was fully informed, he concurred with the decision of his lawyer not to have him take the witness stand. This is unlike the Gallagher case in which Lippitt, without Gallagher's informed consent, terminated the investigation of B.S. and conducted the trial in such a way as to direct attention away from Lippitt's former client, B.S., as an alternate suspect.

In *Cuyler*, the U.S. Supreme Court made it clear that once a trial court decides that a conflict of interest adversely affected a lawyer's representation of his client in a criminal case, the trial court should not indulge in nice calculations concerning the amount of prejudice attributable to the conflict. In *Cuyler*, the U.S. Supreme Court said:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."

In the instant case, Gallagher has demonstrated that Lippitt tried to act on behalf of conflicting interests to Gallagher's detriment; Gallagher is entitled to relief.

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